(3)

Supreme Court, U.S.
FILED

AUG 15 2002

OFFICE OF THE CLERK

No. 02-1

IN THE

Supreme Court of the United States

THOMAS R. PHILLIPS, Chief Justice, NATHAN R. HECHT, Justice, CRAIG T. ENOCH, Justice, PRISCILLA R. OWENS, Justice, JAMES A. BAKER, Justice, Justice, DEBORAH G. HANKINSON, Justice, HARRIET O'NEILL, Justice, and XAVIER RODRIGUEZ, Justice, in their official capacities as Justices of the Supreme Court of Texas, TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION; and RICHARD TATE, in his official capacity as Chairman of the Texas Equal Access to Justice Foundation,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

ROBERT A. LONG, JR.
Counsel of Record
CAROLINE M. BROWN
GREGORY M. WILLIAMS
Covington & Burling
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

JOHN CORNYN
Attorney General of Texas
HOWARD A. BALDWIN, JR.
JULIE CARUTHERS PARSLEY
JACK HOHENGARTEN
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548
(512) 475-2952

Additional Counsel Listed on Inside Cover

DARRELL E. JORDAN
DAVID J. SCHENCK
BETH W. BIVANS
Hughes & Luce, LLP
1717 Main Street, Suite 2800
Dallas, TX 75201

RICHARD A. JOHNSTON
FRANCINE ROSENZWEIG
Hale and Dorr, LLP
60 State Street
Boston, MA 02109

PETITIONERS' REPLY BRIEF

1. a. Respondents agree with Petitioners that the Petition should be granted as to Questions One and Two. *See* Br. in Opp. 1, 10-15, 18. Respondents agree (Br. in Opp. 1) that "the preferable course" is "granting review as to Questions One and Two" rather than holding the Petition in abeyance pending a decision in *Washington Legal Foundation v. Legal Foundation of Washington* ("*WLF v. LFW*"), No. 01-1325 (cert. granted June 10, 2002).

Respondents concur with Petitioners that "[t]he underlying factual issues have been more fully developed here than in *WLF v. LFW*," and therefore "granting review in this case might assist the Court in resolving the questions presented by both cases." Br. in Opp. 1; *see also id.* at 12 ("Because a trial has taken place in this case," but not in *WLF v. LFW*, "the Court's examination of these basic Takings Clause issues may be facilitated by inclusion of the trial record below."). In particular, Respondents note that "[t]he full trial record available in this case may facilitate the Court's determination of whether IOLTA depositors suffer any loss for which the Takings Clause requires a remedy." *Id.* at 15. Similarly, a full trial record "may be particularly helpful in determining whether declaratory and injunctive relief are permissible remedies in Takings Clause challenges to IOLTA programs." *Id.*

Respondents also agree with Petitioners that granting review in this case is "appropriate because the Texas case arises in a context more typical of IOLTA programs nationwide than is the Washington State IOLTA program." *Id.* at 12-13. "The Washington program is unique in that it applies not only to trust funds being held by attorneys but also to escrow funds being held by escrow companies and title companies in connection with real estate transactions." Br. in Opp. 13. In addition, "the plaintiffs in *WLF v. LFW* all

challenge IOLTA in the context of its application to real estate transactions." *Id.*[1]

b. If the Court chooses to grant the Petition in this case, Petitioners are prepared to make adjustments to the usual schedule for briefing and oral argument to permit this case to be argued and decided together with *WLF v. LFW*. *See* Pet. 24. In particular, Petitioners are prepared to file their opening brief in fewer than the 45 days usually allowed under the Court's rules.[2] The Court may find it worthwhile to set both cases for oral argument on the same day and allow a total of two hours for oral argument.

2. Respondents part company with Petitioners as to Question 3, concerning the immunity of the Justices of the Texas Supreme Court. Respondents urge the Court to deny the Petition as to Question 3, on the grounds that the issue has been waived and involves only an "unremarkable" application of law to a particular set of facts. Br. in Opp. 16-18. Respondents are mistaken on both counts.

First, the Justices have not waived their claim to legislative immunity, nor have they prejudiced Respondents.

---

[1] Respondents in *WLF v. LFW* are also on record that consideration of the Texas case, with its full trial record, may assist the Court in resolving the constitutional issues presented in both cases. No. 01-1325 LFW Br. in Opp. 17-18 ("*TEAJF* itself would provide the Court with a vehicle to decide [the constitutional] issues within the same action as *Phillips*, and with the benefit of a full trial on the merits following the Court's remand in *Phillips*. The existence of factual findings from a trial record, as opposed to the summary judgment record in this case, might prove useful to the Court in resolving the issues.")

[2] If the Court is inclined to grant the Petition and hear this case together with *WLF v. LFW*, it may wish to consider the Petition on August 25 or September 6. This would have the effect of accelerating the briefing on the merits.

The Justices asserted legislative immunity in a motion for judgment on the pleadings filed more than seven months before trial. Respondents never moved to strike the Justices' motion, never sought to compel the Justices to disclose the proper defendants, and never asserted any prejudice in the trial court, where the matter could have been easily remedied. The Respondents could not have been prejudiced in any case, because the identity of persons having independent enforcement power is clearly described in the Rules Governing the Operation of the Texas Equal Access to Justice Program (specifically, in Rule 240).

Second, the Texas Justices do not contend that the scope of their official immunity is, in and of itself, sufficiently important to justify further review. Rather, they urge that if this Court grants certiorari as to Questions One and Two, the immunity issue warrants review as an additional question presented.

Respondents assert (Br. in Opp. 16) that the Justices "do not disagree with the Fifth Circuit's interpretation of" *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). That is not so. The Fifth Circuit's expansive reading of "enforcement" acts, which subjects state high courts to claims for prospective relief, virtually nullifies the legislative immunity that *Supreme Court of Virginia* extended to justices acting in their legislative capacity. *Id.* at 734. In that case, the Court held that the Virginia Court was cloaked with absolute immunity for its legislative acts, but was not shielded from claims for declaratory and injunctive relief arising out of enforcement acts.

This conclusion – that the Virginia Court and its chief justice were properly held liable in their enforcement capacities – hinged on various sections of the Virginia Code of Professional Responsibility authorizing the high court to

exercise "independent authority of its own to initiate proceedings against attorneys." *Id.* at 736. That is, the Virginia Court was found to have power beyond that of merely adjudicating complaints filed by others and beyond the courts' normal authority to sanction attorneys for contempt.

This critical distinction – independent authority to initiate proceedings for non-compliance – was omitted altogether from the Fifth Circuit's analysis. Indeed, the appellate court found the procedure established by Rule 24 sufficient to subject the Justices to claims for prospective relief, even though the rule itself makes clear that independent enforcement authority does not lie with the Justices.

Rule 24 requires a Texas attorney to provide annually a written statement of IOLTA compliance *to the TEAJF*. If the attorney fails to do so, *TEAJF* contacts the attorney and attempts to resolve the non-compliance administratively. If the attorney still refuses to comply, the *State Bar of Texas* notifies the Texas Supreme Court *Clerk* – not the Justices – and the clerk automatically places the attorney on a suspension list until the compliance statement is filed. *See* TEAJF Rule 24; *Washington Legal Found. v. TEAJF*, 86 F. Supp.2d 617, 622 (W.D. Tex. 2000).

Respondents also point to Rule 25 as further evidence of the Justices' enforcement powers. But the Justices do not have independent authority to initiate proceedings under Rule 25 either. That rule provides for judicial review of adverse decisions of the Board of Directors for the State Bar, when an attorney requests an exemption from the IOLTA program, an extension of time to comply with a deficiency notice, or an extension of time to file a compliance statement. Moreover, Rule 25 has no relationship to this case, or to Rule 24. The

two rules cannot be reasonably read in conjunction, so as to find enforcement authority on the part of the Justices.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. LONG, JR.
COUNSEL OF RECORD
CAROLINE M. BROWN
GREGORY M. WILLIAMS
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

JOHN CORNYN,
ATTORNEY GENERAL
HOWARD A. BALDWIN, JR.
JULIE CARUTHERS PARSLEY
JACK HOHENGARTEN
P.O. Box 12548
Capitol Station
Austin, TX 78711-2548
(512) 475-2952

DARRELL E. JORDAN
DAVID J. SCHENCK
BETH W. BIVANS
Hughes & Luce, LLP
1717 Main Street, Suite 2800
Dallas, TX 75201

RICHARD A. JOHNSTON
FRANCINE ROSENZWEIG
Hale and Dorr, LLP
60 State Street
Boston, MA 02109